In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1610

HONORABLE WILLIAM O. MEHRTENS, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, PETITIONER

v.

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION [1]

OPINIONS BELOW

The two opinions of the court of appeals (Pet. App. A. 263 - A. 265; A. 267 - A. 272) are reported

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[1] The Securities and Exchange Commission has been participating actively and continuously in this reorganization proceeding in the district court as a party pursuant to Section 208 of Chapter X of the Bankruptcy Act, 11 U.S.C. 608, since shortly after the commencement of the proceeding in 1957. As in *Protective Committee* v. *Anderson*, 390 U.S. 414, 420 n. 3, and *Caplin* v. *Marine Midland Grace Trust Co.*, No. 70-220, decided May 22, 1972, the Commission is "an unnamed respondent before this court." See Rule 21(4) of the Rules of this Court.

at 457 F.2d 104 and 457 F.2d 100, respectively. The opinion of the district court (Pet. App. A. 80) reviewed in 457 F.2d 104 and the orders of the district court reviewed in 457 F.2d 100[2] are unreported.

JURISDICTION

The judgments of the court of appeals were entered on February 7, 1972 (Pet. App. A. 263, A. 267), and petitions for rehearing and rehearing *en banc* were denied on March 13, 1972 (Pet. App. A. 266; 457 F.2d 100, 103). The petition for a writ of certiorari was filed on June 9, 1972. The jurisdiction of this Court is invoked under 11 U.S.C. 47 (c) and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on a petition for extraordinary relief, the court of appeals properly vacated an order of the district court that it held contravened an earlier mandate of the court of appeals and properly ordered the district court to take further action to implement that mandate.

2. Whether the court of appeals properly limited both present and future awards of interim compensation to the general counsel for a trustee in a re-

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[2] These orders granting interim compensation to the trustee's counsel are not reproduced in the petitioner's appendix. They can be found in the record below under Docket Numbers 1334, 1408, and 1409.

organization proceeding under Chapter X of the Bankruptcy Act.

STATEMENT

1. Petitioner is the district judge in the reorganization of TMT Trailer Ferry, Inc. under Chapter X of the Bankruptcy Act, 11 U.S.C. 501 *et seq.*, which was begun in 1957. An aspect of this proceeding was before this Court in *Protective Committee* v. *Anderson*, 390 U.S. 414. After that decision, the proceeding was transferred to petitioner, the trustee resigned, a successor trustee was appointed, and a new general counsel for the trustee was retained. Counsel for the Protective Committee for Independent Stockholders (the "Committee") sought an award of $100,000 interim compensation for services rendered during the first eleven years of the proceeding, and reimbursement of expenses of $22,000.

The successor trustee sought to delay any award of fees to counsel for the Committee and to depose the members of the Committee and its counsel in an exploratory investigation into whether there might be grounds for denying Committee counsel a fee. The Committee sought a protective order against the depositions and instructions from the district judge as to its future role in the case. In a single order, the district judge awarded $10,000 interim compensation and $5,000 reimbursement of expenses and denied the request for a protective order and instructions (Pet. App. A. 2). The Committee and its counsel appealed (Pet. App. A. 3).

In *Protective Committee* v. *Kirkland*, 434 F. 2d 804 (C.A. 5) (Pet. App. A. 2 - A. 8), the court of appeals held that Committee counsel should be given $60,000 interim compensation and $10,000 reimbursement of expenses (the amounts which had been recommended to the district court by the Commission),[3] and provided that the award should "not be subject to vacation, setting aside, reduction or modification except upon proof of legal disqualification" (Pet. App. A. 5 - A. 6). The court of appeals stated that the protective order sought by the Committee and its counsel from the trustee's proposed depositions "should have been issued by the District Judge to prevent undue harassment" (Pet. App. A. 7). The court of appeals also directed that petitioner "should, in the firmest and most emphatic manner possible, state to the Trustee and its counsel the absolute need of coopertaion and harmony with the Protective Committee and its counsel to insure a proper determination and final wind-up of this reorganization" (*ibid.*). A petition by the trustee for rehearing and rehearing *en banc* was denied (Pet. App. A. 10) and this Court denied certiorari. 402 U.S. 907.

On remand, petitioner entered an "Order on the Mandate" (Pet. App. A. 80) specifying the detailed manner in which Committee counsel were to divide the $60,000 interim compensation and $10,000 reim-

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[3] The efforts of Committee counsel are described in *Protective Committee* v. *Anderson*, 390 U.S. 414, 420-423, 429, 431-433, 439, 451.

bursement of expenses which the court of appeals had awarded, permitting the trustee to pursue disqualification proceedings against the Committee and its counsel and authorizing the trustee to conduct discovery proceedings in connection therewith. The disqualification proceedings were based on essentially the same charges which the trustee had previously raised with respect to the Committee counsel's fee and which the court of appeals had rejected (Pet. App. A. 264).

The Committee and its counsel petitioned the court of appeals for an extraordinary writ in order to require the district court to follow the court of appeals' previous decision (Pet. App. A. 89). The Commission supported the petition. The court of appeals granted the petition, stating that petitioner had "misconstrued and misapplied" its mandate (Pet. App. A. 264) and that its previous decision had accordingly been "frustrated" (Pet. App. A. 265). The court ordered petitioner (1) to rescind his order on the mandate, (2) to direct the estate to pay the amounts allowed Committee counsel without restriction, and (3) to cancel the proposed discovery proceedings in connection with the disqualification motions (Pet. App. A. 265).

2. In another order, petitioner allowed the trustee's counsel, Irving M. Wolff, who assumed office in January 1969, $60,583 in interim compensation for his services in 1969 (Pet. App. A. 268). In November 1970, petitioner awarded Wolff interim compensation for services rendered during the first six

months of 1970 of $46,620, at a rate of $60 per hour (Pet. App. A. 268 - A. 269). Pursuant to Section 250 of Chapter X, 11 U.S.C. 650, the court of appeals authorized the Committee to appeal from that award. While that appeal was pending, in March 1971, petitioner awarded Wolff interim compensation for services rendered during the last six months of 1970 of $42,400, also at a rate of $60 per hour (Pet. App. A. 269). The court of appeals authorized the Committee to appeal from that award also. The court of appeals consolidated the two appeals.

Referring to the fact that little had been accomplished toward concluding the reorganization proceeding in the four years since the remand from this Court, and to "the intramural squabbling and fighting which has been going on between counsel," the court of appeals reversed the district court, holding: (1) that the $89,020 allowed the trustee's counsel as interim compensation for services rendered during 1970 was "excessive" and should be reduced to $30,000; and (2) that in the future the trustee's counsel should be allowed no more than $30,000 interim compensation for services rendered in any one year, with the determination of final fees to await the completion of the reorganization proceeding (Pet. App. A. 270 - A. 271).

ARGUMENT

The decisions of the court of appeals were correct and present no issues warranting review by this Court.

1. In vacating petitioner's order with respect to the fees for counsel for the Committee, the court of appeals has determined that the charges which the trustee made against the Committee and its counsel in both the district court and the appellate courts do not warrant continued interruption of the reorganization proceeding for a protracted investigation looking toward disqualification of the Committee and its counsel. In 1970, the court of appeals considered and rejected those charges and ordered petitioner to reorganize the debtor and wind up this lengthy case as quickly as possible (Pet. App. A. 2 - A. 8).

The trustee nevertheless continued his attacks on the Committee and its counsel.[4] Under these circumstances, the court of appeals properly held that the actions of the district court had "frustrated" its earlier mandate and that extraordinary relief was thus appropriate. See, *e.g.*, *United States* v. *Haley*, 371 U.S. 18; *United States* v. *United States District Court*, 334 U.S. 258; *In re Potts*, 166 U.S. 263.

2. The petitioner district judge has no standing to seek review of the ruling of the court of appeals fixing a maximum of $30,000 interim compensation to be allowed counsel for the Chapter X trustee in any one year, since he was not a party to the appeals in

[4] While the court of appeals had stated that the fees it was awarding counsel for the Committee might be recovered on proof of legal disqualification (Pet. App. A. 5 - A. 6), its opinion made clear that there was no need for an investigation of the conduct of the Committee or its counsel and did not contemplate a general discovery seeking evidence of disqualification.

which the ruling was made. In any event, the court of appeals acted properly.

Chapter X does not expressly provide for payments of fees and allowances during a reorganization proceeding, and generally they are not paid until the reorganization has been completed, since that is the time when the judge is in the best position to evaluate the overall result of the proceeding, the contributions made by the several applicants and the amount available to pay all fees and allowances. *In re Keystone Realty Co.*, 117 F.2d 1003, 1006 (C.A. 3). An exception is normally made, however, with respect to interim allowances to the trustee and his counsel to alleviate possible economic hardship in lengthy reorganization proceedings.[5] Interim awards are not intended to reflect the full value of the services rendered during the period, but are payments on account of a future final allowance and should be sufficient only to prevent undue hardship. *In re McGann Mfg. Co., Inc.*, 188 F. 2d 110, 112 (C.A. 3).

The court of appeals here did not fix the amount of final compensation to be allowed the trustee's counsel. All that it determined was that a maximum of $30,000 a year would be sufficient to alleviate any hardship which the length of the proceeding might

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[5] See *e.g.*, Rule 10C, Local Bankruptcy Rules, United States District Court for the Southern District of Florida (Rev. 1968). On occasion, awards of compensation to parties other than the trustee and his counsel may be appropriate prior to the conclusion of the proceeding. *E.g.*, *Protective Committee* v. *Kirkland*, *supra* (Pet. App. A. 2); *In re Inland Gas Corporation*, 73 F. Supp. 785 (E.D. Ky.).

work. The record before the court of appeals was adequate to make such a determination. An allowance of more than $30,000 a year interim compensation could tend to encourage procrastination by the trustee's counsel, particularly in light of the fact that there has been little progress made toward reorganization and substantial time has been spent in fruitless litigation during the years when counsel was awarded annual interim compensation of about $60,000 and $90,000.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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